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No. 08-987

Supreme Court, U.S.  
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**In The  
Supreme Court of the United States**

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RUBEN CAMPA, RENE GONZALEZ,  
ANTONIO GUERRERO, GERARDO HERNANDEZ,  
AND LUIS MEDINA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit**

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**BRIEF OF AMICUS CURIAE FLORIDA  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS -  
MIAMI CHAPTER IN SUPPORT OF PETITIONERS**

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## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
INTEREST OF THE AMICUS CURIAE .....	1
ARGUMENT IN SUPPORT OF GRANTING THE WRIT .....	3
THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW REFUS- ING TO REMAND FOR RESENTENCING BASED ON HARMLESS ERROR CONFLICTS DIRECTLY WITH CASE LAW OF THE NINTH CIRCUIT COURT OF APPEALS, UNREA- SONABLY PLACES THE RISK OF FUTURE ADVERSE CONSEQUENCES FROM THIS JUDICIALLY DETERMINED ERRONEOUS SENTENCE ON THE ERRONEOUSLY SEN- TENCED DEFENDANT, AND IGNORES THIS COURT'S RECENT CASE LAW PLACING AN IMPERATIVE ON CORRECTLY CALCULAT- ING A DEFENDANT'S SENTENCING GUIDE- LINES.....	3
CONCLUSION .....	10

# TABLE OF AUTHORITIES

	Page
CASES	
<i>Benton v. Maryland</i> , 395 U.S. 784 (1969).....	7
<i>Gall v. United States</i> , 128 S. Ct. 586 (2007).....	8
<i>In re Sealed Case</i> , 527 F.3d 188 (D.C. Cir. 2008).....	8
<i>Kimbrough v. United States</i> , 128 S. Ct. 558 (2007).....	8
<i>Rita v. United States</i> , 127 S. Ct. 2456 (2006).....	8
<i>Sibron v. New York</i> , 392 U.S. 40 (1968).....	7
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	5, 9
<i>United States v. Cavera</i> , 550 F.3d 180 (2d Cir. 2008).....	8
<i>United States v. Kincaid</i> , 898 F.2d 110 (9th Cir. 1990).....	4, 5, 9
<i>United States v. Olunloyo</i> , 10 F.3d 578 (8th Cir. 1993).....	9
<i>United States v. Pardo</i> , 25 F.3d 1187 (3d Cir. 1994).....	9
<i>United States v. Pierre</i> , 484 F.3d 75 (1st Cir. 2007).....	9
<i>United States v. Rivera</i> , 282 F.3d 74 (2d Cir. 2000).....	9
<i>United States v. Segien</i> , 114 F.3d 1014 (10th Cir. 1997).....	9

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Williams</i> , 399 F.3d 450 (2d Cir. 2005) .....	6
<i>Williams v. United States</i> , 503 U.S. 193 (1992) .....	6
OTHER AUTHORITIES	
18 U.S.C. § 3742(a) .....	5
U.S.S.G. § 2M3.1(a)(1) .....	3

## INTEREST OF THE AMICUS CURIAE<sup>1</sup>

The Florida Association of Criminal Defense Lawyers ("FACDL") – Miami Chapter is a voluntary bar association consisting of more than 450 criminal defense lawyers who practice in Miami-Dade County, Florida. Its mission is to preserve the adversary system of justice and ensure fundamental fairness, due process, and equal protection for all persons accused of law violations. Among its purposes is to promote the efficient and fair administration of criminal justice and preserving the individual rights of the criminally accused through the improvement of the criminal law, its practices, and procedures. FACDL – Miami is an affiliate of Florida Association Criminal Defense Lawyers, Inc., a not-for-profit corporation with a membership of approximately 2000 criminal defense lawyers throughout Florida. FACDL is an affiliate of the National Association of Criminal Defense Lawyers, a similar organization comprised of some 12,000 members.

Amicus has a special interest in the decision under review because it directly affects the fair

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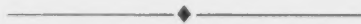
<sup>1</sup> The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

administration of criminal and sentencing justice in our federal jurisdiction.

Amicus focuses on a narrow, but vital, aspect of the decision under review – the court's decision, despite significant error regarding one of petitioner Hernandez's concurrent sentences, *not* to remand his case for resentencing untainted by this error. The court's decision conflicts with caselaw of the Ninth Circuit Court of Appeals. It undermines this Court's recent sentencing opinions that recognize the necessity of district courts making correct calculations of the applicable Sentencing Guidelines. Ultimately, it leaves a known, erroneous, life sentence uncorrected for all times.

The Eleventh Circuit employed its no remand rule without any apparent assessment of the adverse consequences of an erroneous sentence generally, or the adverse consequences Hernandez may suffer specifically. The Eleventh Circuit's rule unreasonably shifts the risk of an erroneous sentence from the government to the improperly sentenced defendant.



## ARGUMENT IN SUPPORT OF GRANTING THE WRIT

**This Court should grant review because the decision below refusing to remand for resentencing based on harmless error conflicts directly with caselaw of the Ninth Circuit Court of Appeals, unreasonably places the risk of future adverse consequences from this judicially determined erroneous sentence on the erroneously sentenced defendant, and ignores this Court's recent caselaw placing an imperative on correctly calculating a defendant's Sentencing Guidelines.**

In sentencing petitioner Hernandez and two of his co-defendants for conspiring to gather and transmit information related to national defense, the district court relied on a Guidelines provision that increases the applicable Guidelines range "if top secret information was gathered or transmitted." U.S.S.G. § 2M3.1(a)(1). Pet. App. 62a-63a, 70a. The district court applied this provision even though it did not find that top secret information was in fact gathered or transmitted; rather, it applied the provision because it concluded that the conspiracy with which the defendants were charged was at least intended to obtain such information. The district court therefore imposed a life sentence against these petitioners.

The Eleventh Circuit held that applying the provision under these circumstances was error because the provision "contemplates a completed event:

the actual gathering or transmission of top secret information" Pet. App. 62a-63a, and remanded the cases of Hernandez's two co-defendants for resentencing. But, the court declined to vacate and remand Hernandez's case for resentencing because he was sentenced to a concurrent sentence of life imprisonment on his conspiracy-to-murder charge. The court concluded that the error in the calculation of Hernandez's sentence for conspiracy to gather and transmit national-defense information was "irrelevant to the time he will serve in prison" and, thus, "harmless with respect to him." Pet. App. 70a. It drew this conclusion without analysis or consideration of any possible adverse consequences (besides time served in prison) of Hernandez's erroneous sentence.

As it acknowledged, the Eleventh Circuit's refusal to remand petitioner Hernandez's case for a simple resentencing hearing before the district judge conflicts with Ninth Circuit Court of Appeals caselaw. Pet. App. 71a. It conflicts with this Court's recent cases placing a greater imperative on proper sentence calculations. It also lets an erroneous sentence stand uncorrected.

Under the Ninth Circuit's decision in *United States v. Kincaid*, 898 F.2d 110 (9th Cir. 1990), a case of this type would be remanded. That circuit will remand an erroneous sentence notwithstanding that it runs concurrently with another, properly imposed sentence of at least the same length. *Kincaid* is correct in light of a criminal defendant's unquestionable right to appeal a sentence if that sentence "was



imposed as a result of an incorrect application of the sentencing guidelines.” 18 U.S.C. § 3742(a). This statutory right of appeal implies an obligation on the part of a court of appeals to correct an acknowledged error. And while *Kincaid* predated *United States v. Booker*, 543 U.S. 220 (2005), and this Court’s subsequent cases emphasizing the need for accurate sentencing calculations, these cases reinforce *Kincaid*’s insistence upon remand to correct the erroneous sentencing calculation.

In remanding the erroneous sentence in *Kincaid*, the Ninth Circuit explained that although a court may not be able to “identify a specific prejudice which may stem from [an] erroneous sentence,” it nevertheless must not “place upon [the defendant] the risk that such a prejudice will manifest itself in the future.” *Id.*, 898 F.2d at 112. This case offers a perfect example of the kind of prejudice that could arise. If this Court grants review and corrects petitioner Hernandez’s conviction on the murder conspiracy charge, his erroneous life sentence on the information-gathering charge will stand uncorrected and could lie outside of the mandate on remand. Hernandez will then be required to seek discretionary reconsideration of a sentence that had already been held to have been erroneously imposed. A similar result will obtain if Hernandez receives clemency on the murder conspiracy charge, a result made more likely here given the extraordinary international support for petitioners’ cause that has been expressed publically and directly to the federal government, Pet. App.

469a-490a, and which presumably will be reiterated in any clemency petition.

The potential for prejudice of this kind, along with others risks that are no less real for not being immediately foreseeable, easily outweighs the minuscule administrative costs of remanding for resentencing. See *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005) (“[T]he cost of correcting a sentencing error is far less than the cost of a retrial. A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel”). There is thus little reason to decline a remand, and every reason to require one.

The Eleventh Circuit attempted to garner support for its no remand rule from this Court’s opinion in *Williams v. United States*, 503 U.S. 193 (1992). Pet. App. 70a-71a. The court’s reliance on *Williams* was misplaced. *Williams* concerned whether a court of appeals must remand for resentencing if it is determined that the district court misapplied the Guidelines by considering an improper factor to support a departure sentence. It held that a remand is necessary unless the appellate court can determine that the error was harmless, i.e., that “the district court would have imposed the same sentence had it not relied upon the invalid factor or factors.” *Id.* at 203. In the instant case, the fact that the district court had also imposed a second life sentence on a different charge is immaterial to whether it would have imposed the same sentence on the challenged count. As

to that sentence, the district court had indeed erred in calculating the Guidelines, an error that resulted in an erroneous life sentence.

On the other hand, several of this Court's older cases indicate a limited vitality and application of the "concurrent sentence doctrine." In *Benton v. Maryland*, 395 U.S. 784 (1969), this Court surveyed its cases applying this doctrine to refuse to consider challenges to convictions when there was a conviction on a separate charge carrying a concurrent sentence of equal or greater length to the sentence on the challenged count. Despite sweeping statements in some of these cases suggesting that this doctrine constituted a jurisdictional bar, the Court held that it was not. *Id.* at 789. The Court cited *Sibron v. New York*, 392 U.S. 40 (1968), which held that a challenge to a conviction for which the sentence was expired was not moot. This Court there noted that even the "mere possibility" of adverse collateral consequences from a challenged conviction sufficed to require review. *Id.* at 54-5. In *Benton* this Court noted that even the "remote . . . possibility" of a collateral consequence, like a conviction being used in some future prosecution to enhance a sentence, "was enough to give this case an adversary cast" and prevent application of the doctrine. *Id.* at 790-1. The Court left open the question whether the "concurrent sentence doctrine" has any "continuing validity as a rule of judicial convenience." *Id.*

This Court's most recent sentencing decisions support a rule requiring remand for resentencing

where an erroneous sentence has been imposed. Although they establish that the decision of what sentence is appropriate in a given case is left to the discretion of the district judge, *see Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Rita v. United States*, 127 S. Ct. 2456 (2006), they concomitantly require the sentencing court to correctly calculate the sentence recommended by the Guidelines. *See, e.g., Gall* at 596 (“a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range”). Additionally, because this Court’s cases have limited the appellate courts’ role in determining whether a particular sentence is substantively reasonable, appellate courts must closely police the procedures that district courts use in imposing sentence. *See, e.g., In re Sealed Case*, 527 F.3d 188, 191 (D.C. Cir. 2008) (“Given the broad substantive discretion afforded to district courts in sentencing, there are concomitant procedural requirements they must follow”); *United States v. Cavera*, 550 F.3d 180, 189-90 (2d Cir. 2008) (en banc) (“This degree of deference is only warranted, however, once we are satisfied that the district court complied with the Sentencing Reform Act’s procedural requirements, and this requires that we be confident that the sentence resulted from the district court’s considered judgment as to what was necessary to address the various, often conflicting, purposes of sentencing”). Under these cases, a district court should be given a second opportunity to consider what sentence is appropriate

upon a legally correct application of the Sentencing Guidelines.

The Eleventh Circuit's approach here, which is also taken by five other circuits,<sup>2</sup> stands in contrast to the approach taken in *Kincaid*, as the court of appeals itself acknowledged. See Pet. App. 71a (citing *Kincaid*). The Eleventh Circuit's rule is unfair and incorrect. It wrongly deprived Hernandez of an effective appeal of his sentence on the conspiracy count. It unjustly placed the risk of all future adverse consequences of the erroneous sentence on Hernandez. It ignored this Court's admonitions as to the importance of proper sentencing calculations and procedure. It also deprived the district court of an opportunity to impose sentence according to a correct view of the law – an opportunity of heightened importance because the district court had imposed a life sentence against Hernandez under a mandatory sentencing regime that *Booker* held unconstitutional.

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<sup>2</sup> See, e.g., *United States v. Pierre*, 484 F.3d 75, 90-1 (1st Cir. 2007); *United States v. Rivera*, 282 F.3d 74, 77-8 (2d Cir. 2000); *United States v. Pardo*, 25 F.3d 1187, 1194 (3d Cir. 1994); *United States v. Olunloyo*, 10 F.3d 578, 582-3 (8th Cir. 1993); *United States v. Segien*, 114 F.3d 1014, 1021 (10th Cir. 1997).

## CONCLUSION

For all these reasons, this Court should grant the petition in order to resolve the split between the circuits and to correct the Eleventh Circuit's error.

Respectfully submitted,

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